

The Commission also has acknowledged the fundamental importance of five pre-ordering subfunctions: (1) customer service record (“CSR”) information; (2) street address validation; (3) telephone number information; (4) due date information; and (5) services and feature information. See LA II Order ¶ 94; SC Order ¶ 147; LA I Order ¶ 47.

Access to these functions must be provided via an application-to-application interface for two reasons. First, an application-to-application interface is needed in order to conduct the pre-ordering process in real-time or near real-time. Real-time processing is important because the pre-ordering process occurs while the customer is on the line with the CLEC, and any failure or delay in these communications has an immediate negative impact on the CLEC’s ability to provide quality service in a timely and efficient manner. Lichtenberg & Sivori Decl. ¶ 52.

Second, an application-to-application interface for pre-ordering is needed because, without it, the CLEC is unable to integrate the pre-ordering and ordering functions with each other or with its back end systems and databases. In New York, without use of an application-to-application pre-order interface, CLECs must use BA-NY’s proprietary graphical user pre-order interface (“GUI”). When using the GUI, the CLEC representative must access the customer’s pre-ordering information via the GUI and then rekey the information into the CLEC’s systems and databases for the CLEC’s internal use and to complete the order. *Id.* ¶ 53. Such manual intervention has a negative impact on a CLEC’s ability to reach commercial volumes of orders. “[T]he additional costs, delays, and human errors likely to result from [not having an integrated pre-ordering/ordering interface] ha[ve] a significant impact on a new entrant’s ability to compete effectively in the local exchange market and to serve its customers in a timely and efficient

manner.” LA II Order ¶ 96 (internal quotation and citation omitted); see also id. ¶¶ 94-100 (discussing importance of integrated pre-ordering and ordering functions).^{35/}

Another prerequisite to integrating the pre-ordering and ordering functions is access to parsed CSR information and parsed address validation responses.^{36/} Id. ¶ 54. Only with parsing can a CLEC control the presentation of the information to its sales and customer service representatives, load the information efficiently into its databases, or use the information to automatically populate its service orders. Id.

2. The Continued Unavailability of Most Pre-Order Subfunctions. Unfortunately, MCI WorldCom still does not have application-to-application access to most of the pre-ordering subfunctions in New York. Responding to delays by BA-NY in developing these interfaces, MCI WorldCom devoted its resources to working with BA-NY at least to have in place working CSR and address validation subfunctions this year, and to develop the remaining subfunctions early next year. Lichtenberg & Sivori Decl. ¶ 56. In September 1999, MCI WorldCom was finally able to move a parsed CSR subfunction into production, but the other basic pre-ordering inquiries, including address validation, telephone number selection and reservation, due date availability, and service and feature availability, remain accessible only through BA-NY’s cumbersome GUI. Id.

35/ The industry standards bodies have recognized CLECs’ need for application-to-application interfaces to be able to conduct timely and accurate pre-ordering inquiries without having to rekey the information into their systems and so that they can integrate the pre-ordering function with their back end systems and databases. See Lichtenberg & Sivori Decl. ¶ 23.

36/ Unless the CSR and customer address information is parsed into identifiable fields (e.g., street number, street name, etc.), the only way to transfer the information to the CLEC systems or to automatically populate orders with the information is to retype the data manually. Id. ¶ 54.

In its application, BA-NY inaccurately claims that by July 1998 it had implemented the EDI-based interface for pre-ordering. BA-NY Joint Decl. Miller & Jordan ¶ 21. Moreover, according to BA-NY, the interface fully satisfies the Commission's requirement because it permits CLECs to integrate pre-ordering and ordering functions with their own systems. *Id.* ¶ 22. BA-NY's claims are not supported by the record.

BA-NY trumpets the fact that KPMG was able to construct an EDI-based interface for all five central pre-ordering subfunctions. BA-NY Br. at 41 n.36. But this does not show that BA-NY has provided the documentation and support necessary for MCI WorldCom or any other CLEC to build these interfaces for use in a production environment. Leaving aside the fact that BA-NY showed favoritism to KPMG during the development of its test interface,^{37/} Lichtenberg & Sivori Decl. ¶ 57-59, the interface eventually built and used in the third-party testing was not as robust as is required in a production environment.^{38/} Nor did KPMG attempt to design the sophisticated transport and security necessary for the interface in production. *Id.* ¶ 59.

3. Continuing Problems with the CSR Subfunction. The EDI interface for pre-ordering that MCI WorldCom has established with BA-NY for parsed CSRs remains unstable; does not return responses in competitive time frames; and is limited to certain order types.

Since putting the parsed CSR interface into production on September 3, MCI WorldCom has experienced periodic failures of the interface. *Id.* ¶ 61. MCI WorldCom and BA-NY have

37/ Even KPMG was unable to build its testing interface using BA-NY's documentation, but instead was forced to use a "trial and error" approach. *Id.* ¶ 60.

38/ KPMG did not attempt, for example, to integrate the pre-ordering and ordering functions or to integrate those functions with any back end systems. KPMG's pre-ordering and ordering tests were separate and distinct. *Id.* ¶¶ 58, 97.

not determined the causes for many of the outages, but they continue to work to stabilize the interface. *Id.*

Even when the interface is up and running, BA-NY is not providing parsed CSR responses in competitive time frames. Under the Carrier-to-Carrier Guidelines, BA-NY is required to provide pre-ordering responses of less than or equal to BA-NY's retail response times plus four seconds, which generally requires CSR response times of about five seconds. While BA-NY claims to meet this standard for unparsed CSRs, BA-NY Joint Decl. Miller & Jordan ¶ 32, MCI WorldCom is experiencing substantially longer intervals -- between 15 and 20 seconds -- for parsed CSRs. This is unacceptable. *See* Lichtenberg & Sivori Decl. ¶ 62. MCI WorldCom has agreed to depart from the "parity plus four seconds" standard of the NYPSC, and has indicated to BA-NY that if it could receive parsed CSRs within 10 seconds it would still be able to function, at least for the time being, in a competitive environment, so long as BA-NY committed to making improvements until a more appropriate interval was possible. Until BA-NY has proven that it can meet this 10-second standard, MCI WorldCom will not be able to make adequate competitive use of this critical pre-order subfunction. *Id.* ¶ 63.

Finally, MCI WorldCom just recently learned that BA-NY's parsed CSR capability does not cover all product and service orders. BA-NY cannot provide parsed CSRs, for example, for ISDN orders. This is not a limitation described in any BA-NY business rule, and at present BA-NY has not met its burden of proving that it provides parsed CSRs for all order types, as it had previously represented. *Id.* ¶ 64.

4. Absence of Address Validation Subfunction. Street address validation is the other EDI pre-order subfunction that MCI WorldCom and BA-NY have agreed to put into production

by the end of the year. This is the subfunction that validates each customer's service address against the address that BA-NY holds in its customer address database. Without a complete and valid service address, MCI WorldCom cannot reserve a telephone number for the customer, schedule a due date for service, or create a service order. *Id.* ¶ 48.

MCI WorldCom today is forced to operate without an application-to-application address validation subfunction. *Id.* ¶ 65. As a result, MCI WorldCom representatives today do not even attempt address validations for new customers because it is simply too unwieldy and time-consuming to try to use the address validation process available on the GUI.^{39/} For customers migrating from BA-NY, MCI WorldCom obtains their valid service addresses from their CSRs. New customers, however, do not have a CSR. Despite the importance of validating these addresses, MCI WorldCom does not do so today. In order to avoid the delays and problems associated with using the GUI, MCI WorldCom relies on special software that validates the addresses using listings from the post office, rather than actual service addresses. While far from ideal, this approach at least avoids having to use the GUI.^{40/} MCI WorldCom cannot adequately

^{39/} Between ****REDACTED**** and ****REDACTED**** percent of MCI WorldCom's UNE-P residential customers are migrations from BA-NY. The other ****REDACTED**** to ****REDACTED**** percent are new orders for service. *Id.* ¶ 65 n.6.

^{40/} MCI WorldCom's current practice for reserving telephone numbers using the GUI shows how cumbersome the process is. To reserve a telephone number for a new customer, the MCI WorldCom sales representative puts the customer on hold while he contacts a second MCI WorldCom representative who is trained on the GUI, and the second representative then accesses the GUI and reserves the telephone number. The original sales representative then keys the number into MCI WorldCom's systems, returns to the customer, and completes the pre-ordering process. *Id.* ¶ 66.

increase sales and expand its entry into the local markets in a sustainable fashion so long as it is forced to rely on such splintered and manually intensive processes.^{41/} *Id.* ¶ 66.

None of these problems are insolvable. But taken together, these and other difficulties^{42/} show that BA-NY needs to complete the job it started and provide CLECs with a proven, working, industry standard pre-order interface. Until it does, MCI WorldCom will remain hampered in its ability to compete in the mass markets at full commercial volumes.

D. BA-NY Should Provide Advanced Services Loops.

Competitors need access to loops capable of functioning with digital subscriber line (“DSL”) technology. That technology enables customers to obtain high-speed access over existing copper telephone lines to corporate networks and the Internet, among other uses. *See* Declaration of Annette Guariglia at ¶ 3 n.1 (“Guariglia Decl.”) (appended at Tab B). Nearly 90 percent of present and future growth in the telecommunications industry is expected to involve data traffic. *See id.* ¶ 21. Unfortunately, BA-NY has imposed both price and non-price barriers to competitors’ access to DSL-capable loops.

^{41/} Additionally, even when MCI WorldCom is able to implement BA-NY’s address validation function via EDI, that functionality is deficient in at least one important respect: BA-NY’s new address validation function does not provide partial address matching capability. Since new customers do not have telephone numbers, however, address validation must be accomplished using the address provided by the customer, which in many cases will not match perfectly the address in BA-NY’s database. With partial address matching, a CLEC can submit a partial address, and BA-NY returns several possible complete addresses. BA-NY’s systems should be able to use partial matching to determine and validate addresses. *Id.* ¶ 67.

^{42/} *See* Lichtenberg & Sivori Decl. ¶¶ 70-82.

BA-NY's DSL pricing will be examined by the NYPSC for the first time in a proceeding that is not expected to be completed until the end of the year.^{43/} BA-NY's current, unilaterally-imposed, tariffed rates for DSL-capable loops are not cost-based and are so prohibitively high as to thwart competition for data services. These anticompetitive DSL prices constitute a significant barrier to competition.

Under BA-NY's current DSL offering, the cost of pre-qualifying, ordering, conditioning and provisioning just one two-wire DSL-capable loop of less than 18,000 feet may exceed \$1,500. See id. ¶ 19. For longer two-wire DSL-capable loops, the cost of pre-qualifying, ordering, conditioning and provisioning a single loop may exceed \$4,000. See id. ¶ 20. These prices are based largely on high, non-cost-based charges for conditioning loops, i.e., removing bridged taps and load coils.^{44/} In addition, CLECs (other than MCI WorldCom, which is exempt pursuant to its interconnection agreement) are subject to special charges for constructing alternative copper facilities in order to offer DSL services to a customer served by BA-NY's integrated digital loop carrier ("IDLC") facilities, because of limitations BA-NY imposes on the availability of such loops.^{45/} These construction charges are currently imposed on an individual

43/ See Guariglia Decl. ¶ 4.

44/ BA-NY charges CLECs \$945.39 per loop for removing multiple bridged taps and \$1,814.49 per loop for removing load coils from a loop shorter than 27,000 feet. See Guariglia Decl. ¶ 17. See also BA-NY's Proposed Revisions to NY P.S.C. 916 Tariff (effective Sept. 9, 1999), section 5.5.2 (BA-NY App. D, Tab 206). BA-NY also imposes excessive charges for pre-order OSS functions involving DSL. For example, its charge for an "Engineering Query," which is required virtually any time a CLEC wishes to offer a DSL-based service that is different from the limited DSL services BA-NY offers to its own customers, is \$123.67 per loop plus an additional \$81 of supplemental charges. See Guariglia Decl. ¶ 15.

45/ See id. ¶¶ 6 n.6, 14 n.17; Joint Supplemental Affidavit Update of Donald E. Albert, Julie A. Canny, George S. Dowell, Karen Maguire and Patrick J. Stevens on Behalf of BA-NY-New

case basis (Guariglia Decl. ¶ 6 n.6) which raises concerns about unreasonable prices, transaction costs from protracted negotiations, and CLECs' inability to plan for such costs. Moreover, because BA-NY will not replace its up-to-date IDLC facilities for its own retail customers, these are costs that only a CLEC -- and never BA-NY -- is forced to incur. BA-NY therefore can exploit a significant price advantage over its competitors. These non-cost-based charges make it difficult for CLECs to compete with BA-NY to provide New York State customers with DSL service.

BA-NY also imposes important non-price restrictions on leasing DSL-capable loops that result in DSL services being unavailable to MCI WorldCom and other CLECs on terms and conditions that are nondiscriminatory.

In two recent orders,^{46/} the Commission has issued rules governing the deployment of DSL. It has ordered that:

- (i) ILECs may not deny a request for an unbundled loop for the provision of ADSL service (free of loading coils, bridged taps and other electronic impediments) on the ground that it does not itself offer advanced services over the same loop, see Advanced Service Order and NPRM ¶ 53;
- (ii) ILECs must provide requesting carriers with fully functional conditioned loops, including loops provisioned through remote concentration devices such as digital loop carriers, see id. ¶ 54;

York, NYPSC, Case 97-C-0271, ¶¶ 26, 28 (June 7, 1999) (BA-NYApp. C, Tab 755).

^{46/} See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order, an Notice of Proposed Rulemaking 13 F.C.C.R. 24011 (1998) ("Advanced Services Order and NPRM"); In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 F.C.C.R. 4761 (1999).

(iii) ILECs may not relegate new entrants to slower and more cumbersome pre-ordering processes designed to obtain information about whether a loop is capable of supporting DSL-based services, see id. ¶ 56.

The Commission recently has stated that in the UNE Remand proceeding it concluded that in most circumstances competitors may not get unbundled access to DSL-equipped loops or a combination of elements including DSL equipment.^{47/} Such a ruling makes it even more important that BA-NY provide competitors DSL-capable loops so that they can use those loops to create their own DSL service offerings.

Despite the NYPSC's efforts during the past few months to work with carriers to resolve outstanding issues associated with BA-NY's DSL offering, significant problems remain, and BA-NY's DSL offering fails to comport with the FCC's rules. See Guariglia Decl. ¶ 3.

BA-NY is not currently offering competitors DSL-capable loops when loops are served by IDLC, on the ground that it is not offering its own retail customers this choice. See id. ¶ 6, BA-NY Joint Decl. Lacouture & Troy ¶ 77 (BA-NY App. A, Vol. 1). If it is technically feasible for CLECs to provide DSL service to customers over IDLC loops, however, they should be allowed to do so.

Additionally, the pre-ordering processes introduced by BA-NY to provide CLECs with DSL loop qualification information are inadequate and delay a CLEC's ability to provide DSL services to its customers. See Guariglia Decl. ¶ 7. BA-NY offers CLECs two tiers of access to loop qualification data. First, CLECs can electronically access a mechanized loop qualification

^{47/} FCC Press Release, FCC Promotes Local Telecommunication Competition (Sept. 15, 1999) (http://www.fcc.gov/Bureaus/Common_Carriers/News_Releases/1999/nrcc9066.html). CLECs are entitled to DSL equipment when they are unable to install their own equipment, as will often be the case, for example, when a customer is served with an IDLC loop.

database specifically designed for BA-NY's limited ADSL/HDSL retail offering. Second, CLECs can request that BA-NY manually research and provide additional loop make-up information. Id.

BA-NY's mechanized loop qualification database provides only loop make-up information relevant to the limited DSL services that BA-NY offers its own retail customers. As a result, it is not sufficient for CLECs, who have different and broader DSL service needs. See id. ¶¶ 8-10. Specifically, the database fails to provide CLECs with any of the following critical information: (1) loop length including bridge taps for loops over 18,000 feet in length; (2) the length of the loop without bridged taps; (3) the location and number of bridged taps; (4) the loop wire gauge; (5) spectrum management information; and (6) the presence of load coils, digital loop carriers, repeaters, Digital Added Main Lines ("DAMLs") and pair gain devices. See id. ¶ 9.^{48/}

Because each DSL technology has different parameters and its own unique loop requirements,^{49/} without this information a CLEC cannot determine what type of DSL service is appropriate for a particular customer. See id. ¶¶ 10-11. But most of this information is not contained in BA-NY's mechanized loop qualification database, and the only way a CLEC can

^{48/} Some of this loop data is contained in a BA-NY internal database called LFACS, but BA-NY refuses to provide CLECs with electronic access to this database, or indeed any direct access to this database, and is unwilling to transfer the information contained in the LFACS database to the mechanized loop qualification database. See id. ¶ 15 n.18.

^{49/} For example, ADSL can only be offered to customers served by loops up to 18,000 feet in length, while SDSL and IDSL can be provisioned on loops up to 20,000 feet and 26,000 feet in length, respectively. Also, IDSL can be provisioned on loops with repeaters and digital loop carriers while all other forms of DSL require "clean" copper loops from end to end (i.e., no load coils, repeaters, digital loop carriers, and minimal bridged taps). See id. ¶ 10.

access the critical missing information is through BA-NY's manual processes, even though it must always pay to use the mechanized database, whether it uses it or not. *Id.* ¶¶ 11-12. This is highly discriminatory both because of the costs and delay inherent in using BA-NY's manual systems.^{50/}

In New York, BA-NY can efficiently provide DSL-based services, but its competitors cannot. Correction of these problems will enable CLECs to compete effectively against BA-NY, as well as to provide DSL services more broadly to residential and small business customers whom BA-NY chooses not to serve. This is a problem that must be addressed.

E. BA-NY's Performance Remedies.

A final overarching problem challenging MCI WorldCom's local business in New York today is BA-NY's failure to implement a performance remedy plan that will adequately prevent backsliding. A strong performance plan is important today and will become even more critical after BA-NY takes the final steps necessary to complete the opening of its local markets to competition. Although BA-NY rightfully emphasizes that "facilities-based competition is particularly well-established," BA-NY Br. at 56, at least in New York City, that method of entry works primarily for large and medium-sized business customers in one very high-density geographic area, and CLECs cannot rely exclusively on their own facilities to serve residential

^{50/} In almost all instances, CLECs seeking to provide DSL service which is different than BA-NY's retail service will have to request that BA-NY conduct an expensive and time-consuming "Engineering Query" in order to obtain most of the loop make-up information it needs to provide DSL services to customers. BA-NY provides a less extensive (and less expensive) manual process called a "Manual Loop Qualification," but this process provides so little information as to be virtually useless. *See id.* ¶¶ 13-15.

and small business customers in most geographic areas.^{51/} See Beard & Mayo Decl. ¶¶ 37-41.

That is why it is still true in New York that “the ability of new entrants to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress’ objective of promoting competition in the local telecommunications market.” See MI Order ¶ 332.

Until facilities-based competition has grown to the point where CLECs have other options for connecting to their customers if they encounter discrimination from BA-NY, the Commission cannot rely solely on the market to protect against backsliding, and post-entry regulatory safeguards constitute a vital bulwark to protect the competitive gains that have been achieved in New York. See Beard & Mayo ¶ 42.^{52/} As the Commission has recognized, systems must be in place to insure that BA-NY’s commitments to providing parity service to CLECs are enforced through remedies sufficiently severe to constitute a genuine deterrent after BA-NY enters the long-distance market, and without the need for lengthy regulatory proceedings. See MI Order ¶ 394. It is therefore unfortunate that the performance plan that BA-NY has proposed is inadequate to provide a sufficient deterrent to discriminatory conduct.

Performance plans have three components: First, the plan must set standards. Second, the plan must effectively measure performance to determine if it meets the standards. Third, it must

51/ See Donoghue & McMurtrie Decl. ¶¶ 17-20; Declaration of T. Randolph Beard & John W. Mayo at ¶¶ 37-41 (“Beard & Mayo Decl.”) appended at Tab G.

52/ The rapidly increasing technological complexity of the nation’s telecommunications infrastructure both provides increased opportunities for a BOC with substantial market power to discriminate against its local and long-distance competitors and makes this discrimination more difficult to detect. See Declaration of Robert A. Mercer ¶¶ 17-20 (“Mercer Decl.”), appended at Tab G.

provide for remedies when the BOC's performance falls short. With a few exceptions,^{53/} BA-NY has agreed to both appropriate standards and measurements. Unfortunately, BA-NY's remedy system is inadequate.

The amended Performance Assurance Plan ("PAP")^{54/} and the amended Change Control Assurance Plan ("CCAP")^{55/} are inadequate to their purpose; they are toothless and riddled with loopholes.^{56/} The plans work as follows:

The PAP's "Mode of Entry" provision aggregates BA-NY's performance on selected performance metrics for each of four modes of entry -- resale, UNE, interconnection, and collocation. See PAP, at 5-8. The PAP makes a maximum of \$75 million annually available for Mode of Entry remedies (doubling to \$150 million if a special remedy provision is triggered). See id. at 2-3.^{57/}

The PAP's "Critical Measures" provision provides remedies for deficient performance on eleven specific metric categories; \$75 million is the maximum remedy available for Critical Measures remedies. See id. at 3, 9-11.

The PAP's "Special Provisions" address three categories of service quality: UNE flow-through, UNE ordering, and hot cut performance. Separate dollar amounts are available for two of the three Special Provisions. See id. at 11-13.

53/ See Declaration of Karen Kinard ("Kinard Decl."), appended at Tab D (discussing deficiencies in several performance measures including pre-order response time, firm order confirmations, and completion notices).

54/ Joint Decl. of Dowell & Canny BA-NY App. A, Vol. 3, att. C, exh. 1).

55/ Id., att. C, exh. 2.

56/ MCI WorldCom recently filed extensive comments on the PAP and CCAP with the NYPSC. See Comments of MCI WorldCom, Inc. In re Notice of Proposed Rulemaking, the Amended Performance Assurance Plan, and the Amended Change Control Assurance Plan for BA-NY - New York, Case Nos. 97-C-0271 & 99-C-0949, at 3 (filed Oct. 4, 1999).

57/ The NYPSC has the authority to reallocate the amounts provided under the plans.

Finally, the CCAP provides \$10 million in remedies for substandard performance on four metrics relating to change management, with an additional \$15 million in remedies available from amounts allocated to the Mode of Entry categories. See CCAP, at 1-3.

Collectively, this scheme suffers from two deficiencies. First, the plans contain maximum remedy amounts that provide inadequate incentives to prevent discrimination. Second, the plans improperly limit and distort remedy calculations through a flawed and overly complex scoring system.

1. The Plans' Remedy Levels Should Be Increased. For the remedy plans to be effective, the remedy amounts^{58/} that BA-NY is required to provide for subpar performance to CLECs must be equal to or greater than the benefits that BA-NY would receive over time from providing such poor performance, adjusted to account for the probability that the plans will not detect all instances of discrimination. See Joint Declaration of George S. Ford and John D. Jackson, ¶¶ 4-21, appended at Tab C.

The PAP and CCAP proposed by BA-NY in theory provide maximum annual remedy amounts of \$269 million.^{59/} This amount is insufficient to deter BA-NY from providing non-

^{58/} The plans do not even provide for cash payment to CLECs, only bill credits. This aspect of the plans is an additional limitation on their effectiveness, in that CLECs can never be compensated for amounts over that which they have ordered from BA-NY. Moreover, CLECs who are driven out of the market by BA-NY's discrimination (or whose market entry is limited as a result of BA-NY's failures) would never receive compensation under the plans.

^{59/} The \$269 million maximum annual remedy amount assumes that extraordinarily deficient service by BA-NY with respect to all of the "Mode of Entry" components of the plans for an entire year triggers the doubling of the Mode of Entry ceiling from \$75 million to \$150 million. See PAP at 8. As discussed below, due to the many sub-caps incorporated in the plans, as well as the multiple layers of forgiveness incorporated into the scoring system, it is extremely unlikely that BA-NY would ever face any remedies that even remotely approach the \$269 million annual ceiling.

parity service to CLECs. It represents only 3 percent of BA-NY's total annual revenues and 8 percent of its annual cash flow. Based on BA-NY's profit margin for local exchange service (exclusive of access services) and the historical rate at which AT&T lost market share following divestiture, the annual remedy level should be significantly higher. See Ford & Jackson Decl. ¶ 44.

Even if \$269 million represented a sufficient remedy amount, the plans' byzantine designs make it extremely unlikely that BA-NY would ever pay the maximum annual amount. The plans use many intermediate caps on credits to limit the amount BA-NY would owe. These include both monthly caps and separate caps on the credit due under the several service quality provisions.^{60/} BA-NY would have to provide virtually across-the-board discriminatory service before reaching the inadequate maximum annual remedy amounts.^{61/} While the plans give the NYPSC authority to reallocate the remedy amounts among provisions of the plans, the monthly caps remain in place.^{62/} In addition, the need for regulatory action to reallocate the caps undermines the purpose of having a self-executing remedy plan.

^{60/} For example, although the PAP allocates \$75 million annually to the "Mode of Entry provisions," the plan puts only \$1,354,167 per month at risk in remedy payments for interconnection trunks. See PAP 8. BA-NY could decide to target competitors' request for trunks, thereby totally disrupting facility-based and UNE-based competition, and yet only have to provide a maximum of \$16.25 million in bill credits.

^{61/} Several different features of the scoring system also give layer upon layer of forgiveness to BA-NY, allegedly to account for the minimal probability that deficient performance reporting is the result of random variation in the data and does not represent actually deficient performance. See Ford & Jackson Decl. ¶ 36.

^{62/} See PAP at 4.

2. The Design of the Scoring System Allows Discrimination to Go Unremedied. The scoring system of BA-NY's performance plans suffers from design defects that render it inadequate to prevent BA-NY discrimination.

First, the plans determine remedy amounts primarily by aggregating performance provided to all CLECs, instead of basing remedies on deficient service provided to individual CLECs.^{63/} Aggregation "averages out" targeted discrimination and permits BA-NY to discriminate against a particular competitor while providing adequate service to others. *See Ford & Jackson Decl.* ¶¶ 65-66. In addition, aggregation among CLECs skews remedies in favor of CLECs with the most usage, as opposed to CLECs who have experienced the most discriminatory service. Basing remedy amounts on harms to individual CLECs would help preserve competition, because greater payments would then flow to CLECs who had been most injured by BA-NY's actions (and who will therefore have incurred the most costs in attempting to correct or compensate for the deficient service).

Second, the remedies do not increase with the severity of the discrimination. For example, the scoring methodology does not distinguish between a delay in provisioning a UNE of 2 days and a delay in UNE provision of 30 days. *Ford & Jackson Decl.* ¶ 67.

^{63/} BA-NY has included only one provision, the "Individual Rule," that calculates remedy amounts for Critical Measures on the basis of deficient performance provided to individual CLECs. *See* PAP at 10. The Individual Rule comes into effect only when, for a month in which CLECs on the average have received parity service under the Critical Measures portion of the PAP, a particular CLEC has received subpar service for at least two months. *See id.* at 10 & n.12. Thus, BA-NY can target a CLEC for discrimination in any one month, for example in a month in which the CLEC launches a wide scale marketing promotion, without invoking this rule.

Third, the aggregation of remedies in the Mode of Entry provision, as well as the elimination of many metrics from the plans altogether, limit the plans' effectiveness. Self-executing remedy plans must "ensure compliance with each standard."^{64/} Yet here, BA-NY must comply with only a limited number of metrics, and the metrics monitored through the Mode of Entry provision are aggregated with other metrics. The plans' aggregation of metrics means that BA-NY could readily average out or mitigate deficient performance on selected metrics with adequate performance on others. Per-measure remedies with escalating amounts for the magnitude and duration of the specific deficiency are necessary to compel BA-NY to provide adequate performance.

Fourth, the caps on remedies for "Mode of Entry" provisions mean that gross failures of performance would result in only limited remedies. For example, even a complete cessation of collocation would cause BA-NY to pay a maximum of \$5 million annually under these provisions. Also, because the remedies are compartmentalized, by focusing its discrimination on initial functionalities such as pre-ordering or ordering, BA-NY could undermine its competitors without being penalized for the later, downstream functions that the CLEC cannot perform at all due to its initial injury.

^{64/} In re Applications of NYNEX Corporation, Transferor, and BA-NY Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 F.C.C.R. 19985, ¶ 194 (1997) (emphasis added).

Finally, BA-NY has omitted relevant performance metrics from its list of eleven “Critical Measures.” An effective remedy plan would include all of the metrics established by the NYPSC, omitting only a few diagnostic measures.^{65/}

Collectively, these problems undermine the deterrent effect of the plans. BA-NY’s plans are not the “appropriate, self-executing enforcement mechanisms” contemplated by this Commission. ML Order ¶ 394.

II. THE PUBLIC INTEREST TEST.

A. The State of Local Competition.

The public interest test requires “an assessment of whether all procompetitive entry strategies are available to new entrants,” and whether “the BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition.” ML Order ¶¶ 386-387 (footnote omitted). In Part I, MCI WorldCom explained five significant issues that affect MCI WorldCom’s present ability to compete in New York, especially for residential and small-business customers. BA-NY’s successful resolution of these issues will protect post-entry the enormous gains that have been made to date. These same concerns apply with equal force as the Commission considers whether it would be in the public interest to grant this application.

^{65/} At a minimum, the list of Critical Measures should be expanded to include the metrics in the “Joint Remedies Proposal” previously submitted by AT&T and MCI WorldCom. See Attachment 3 to the Ford & Jackson Decl. at att. A (Tables C and D).

Most competition in New York depends upon CLECs' use of BA-NY facilities.

Although facilities-based CLECs have gained a significant 16% market share in Manhattan,^{66/} facilities-based CLECs still have a very small share of the total local market in New York State. CLECs' market share of loops (not including leased loops), for example, appears to be under 5 percent. See Beard & Mayo Decl. ¶ 35.^{67/} Facilities-based competition is practically non-existent outside of Manhattan. See id. ¶¶ 37-41.

Accordingly, in addition to competitive pricing, there must be functioning OSS that enables CLECs to use leased facilities and resold services. And, because for the foreseeable future CLECs will continue to need to rely on BA-NY facilities, there must be a system of effective performance remedies to prevent backsliding. See id. ¶¶ 8-18 (market forces alone insufficient to guard against discrimination); Mercer Decl. ¶¶ 82-121 (describing opportunities for BOCs to engage in non-price discrimination).

These concerns about post-entry backsliding also apply to BA-NY's ability to discriminate against IXCs in the provision of access services to interexchange carriers. As the dominant local carrier, BA-NY controls critical aspects of access, involving such matters as PIC changes, the availability of CPNI information, and the critical databases relating to operator services, directory assistance and directory listings upon which IXCs rely. BA-NY has ample

^{66/} Beard & Mayo Decl., Table 1.

^{67/} MCI WorldCom's experience from terminating long-distance calls to BA-NY, other ILECs, and CLEC customers in New York State supports that conclusion. MCI WorldCom's terminating access minute data for June indicates that CLECs served only 3.8 percent of the local exchange market in New York State while ILECs served 95.8 percent (wireless carriers served the remaining 0.4 percent). See id. ¶ 36.

opportunity to engage in discriminatory practices that could benefit its long-distance affiliate. See Kinard Decl. ¶¶ 26-31. The protections in the Act against discriminatory treatment need to be implemented through regulatory mechanisms that are not yet in place. With the imminent prospect of BOC interLATA entry, the FCC should move promptly to implement an effective system of performance standards and self-executing remedies for exchange access services to assure that BOCs do not act on their incentive to favor their own long-distance subsidiaries in the provision of those services.^{68/}

OSS and performance remedies are only two of the factors that the Commission should consider in evaluating whether local competition is well-established and here to stay. There are hundreds of interrelated facts that are relevant to the question whether the market is irreversibly open. The adequacy of implementation of any one condition should not be viewed in isolation.

Reviewing the relevant factors, although important final steps remain incomplete, MCI WorldCom believes that the basic pieces are in place to ensure that New Yorkers increasingly will enjoy benefits from competition. The primary factors on which MCI WorldCom relies are these:

Substantial facilities-based competition and associated investment exists in New York, primarily in the New York metropolitan area. That investment includes extensive fiber rings, numerous switches, and loops to hundreds of buildings. Although large business customers have been the primary beneficiaries of these investments, CLECs in limited circumstances use their own facilities to serve smaller businesses and residential customers as well.

^{68/} Some forms of discrimination against IXC's may not be able to be deterred or remedied through a self-executing performance plan. As to those, the IXC's the BOC's may well need to consider private dispute resolution systems to supplement an FCC complaint process that may be ill-suited to handle these kinds of disputes.

Collocation has been completed in 175 end offices serving 85% of BA-NY's residential lines. See Lacouture & Troy Decl. ¶ 29. CLECs have been able to serve customers effectively from these collocation sites using facilities purchased both from access tariffs and under local interconnection agreements.

BA-NY has made the platform available at rates that -- while not perfect -- permit CLECs to offer competitively priced retail service without paying access charges to BA-NY, and the NYPSC is reexamining those rates to assure that they are competitive.

BA-NY has implemented electronic OSS for most key functions needed to support CLEC growth. These systems have been subjected to extensive and thorough third-party testing closely supervised by the state commission, and the results have been positive, with a few exceptions.

BA-NY has made firm, enforceable commitments to introduce specific improvements on a defined timetable to its systems that currently function adequately but need to be upgraded as competition develops.

The NYPSC has demonstrated time and again that it is procompetitive, proactive, and effective. It has made clear its continued commitment to the success of local competition, both by pushing BA-NY to do the additional work remaining to be done, by enforcing BA-NY's existing obligations, and by devoting the agency resources necessary to this challenging task.

When these factors are considered in their totality, New York is ahead of any other state in BA's own region -- and indeed in the country. In no other state does this combination of procompetitive conditions exist. Some states are closer than others, but regrettably BOCs in many states have chosen not to take the steps needed to comply with the requirements of sections 251 and 271. MCI WorldCom hopes that these market-opening steps that BA-NY has already taken in New York are promptly implemented in other states so that MCI WorldCom can carry out its plan to provide cost-effective, innovative local service to residential and business customers throughout the country.

B. The State of the Long-Distance Market.

There can be no serious question about the highly competitive nature of the long-distance market. As Chairman Kennard recently stated, “in the long-distance arena, the marketplace is competitive and robust.”^{69/} BA-NY’s claim that the long-distance market is currently characterized by limited competition is belied by its own refusal to compete in the long-distance market outside of its region.

Long-distance prices are low and falling.^{70/} Contrary to the claims of BA-NY’s experts, prices have fallen net of access of charge reductions. See Beard & Mayo Decl., att. 3, ¶¶ 17-20. In addition, the widespread availability of discount calling plans has lowered long-distance prices even further. Even low-volume long-distance callers are well served by the current state of competition. Flat rate plans for less than ten cents per minute are available with no monthly fees or minimum calling requirements, and dial-around plans are available for callers who make only infrequent long-distance calls. Id. ¶¶ 21-23. Hundreds of long-distance companies are flourishing in the long-distance market, both as resellers and facilities-based carriers. Long-distance competition is strong, and the Commission need not reconsider its conclusion that the principal focus of the public interest inquiry ought to be on local, not long-distance, competition.

^{69/} Oral Testimony of William E. Kennard, Chairman, FCC, Before the Senate Commerce Comm., 1999 WL 332555, at 2 (May 26, 1999).

^{70/} See Beard & Mayo Decl., Att. 3, ¶ 16 (noting 70% decline in calling rates since divestiture).

CONCLUSION

In sum, New York has taken important steps in opening its market, and MCI WorldCom looks forward to continued progress on remaining issues so that New York's consumers finally can enjoy the full benefits of sustainable competitive local telephone service.

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CERTIFICATE OF SERVICE

I, Mark D. Schneider, hereby certify that I have this 19th day of October, 1999, caused a true copy of Comments of MCI WORLDCOM, Inc. and Appendices Volumes I and II to be served on the parties listed below:

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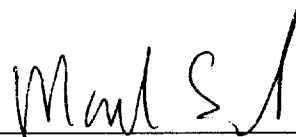
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